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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. JAVIER ARELLANO et al., Defendants and Appellants.	B138851 (Super. Ct. No. VA054479 c/w BA184992)

APPEALS from judgments of the Superior Court of Los Angeles County, Albert D. Matthews, Judge. Affirmed as modified with directions.

Sylvia Koryn, under appointment by the Court of Appeal, for Defendant and Appellant Javier Arellano.

Karen L. Landau, under appointment by the Court of Appeal, for Defendant and Appellant Rene Jovel.

Dale Dombkowski, under appointment by the Court of Appeal, for Defendant and Appellant Ismael Perez, Jr.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Mary Sanchez, Supervising Deputy Attorney General, and Ronald A. Jakob, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendants Javier Arellano, Rene Jovel and Ismael Perez, Jr., appeal from judgments of conviction entered after a jury trial. Defendants were convicted as follows: All three defendants were convicted on count 1 of the second degree robbery of Domingo Ekonomo (Pen., Code, § 211), on count 2 of the second degree robbery of Jorge Jimenez (*ibid*.), on count 3 of assault with a semiautomatic firearm on Domingo Ekonomo (*id*., § 245, subd. (b)), on counts 4 and 5 with the false imprisonment by violence of Domingo Ekonomo and Jorge Jimenez (*id*., § 236), and on count 7 with the second degree commercial burglary of Ekonomo Car Sales (*id*., § 459). Defendant Perez was convicted on count 6 of possession of a firearm by a felon (*id*., § 12021.1). Defendants Arellano and Jovel were convicted on counts 8 and 9 of the first degree residential robbery of Ramiro and Angelina Romo (*id*., § 211) and on count 10 of the first degree residential burglary of Ramiro Romo (*id*., § 459).

As to defendant Arellano, the jury found as to counts 1 and 2 that a principal was armed with a handgun (Pen. Code, § 12022, subd. (a)(1)) and defendant personally used a handgun in the commission of the offenses (*id*., §§ 12022.5, subd. (a)(1), 12022.53, subd. (b)). The jury found as to counts 3, 4 and 5 that a principal was armed with a handgun (*id*., § 12022, subd. (a)(1)) and defendant personally used a handgun in the commission of the offenses (*id*., §§ 1203.06, subd. (a)(1), 12022.5, subd. (a)(1)) and as to count 7 that defendant personally used a handgun in the commission of the offense (*id*., § 12022.53, subd. (b)). As to counts 8, 9 and 10, the jury found defendant personally used a handgun in the commission of the offenses (*id*., §§ 12022.5, subd. (a)(1), 12022.53, subd. (b)). The trial court sentenced defendant to state prison for the term prescribed by law.

As to defendant Jovel, the jury found as to counts 1, 2, 3, 4 and 5 that a principal was armed with a handgun (Pen. Code, § 12022, subd. (a)(1)). The jury found as to counts 8, 9 and 10 that defendant personally used a handgun in the commission of the

offenses (*id*., §§ 12022.5, subd. (a)(1), 12022.53, subd. (b)). The trial court sentenced defendant to state prison for the term prescribed by law.

As to defendant Perez, the jury found as to counts 1 and 2 that a principal was armed with a handgun (Pen. Code, § 12022, subd. (a)(1)) and defendant personally used a handgun in the commission of the offenses (*id*., §§ 12022.5, subd. (a)(1), 12022.53, subd. (b)). The jury found as to counts 3, 4 and 5 that a principal was armed with a handgun (*id*., § 12022, subd. (a)(1)) and defendant personally used a handgun in the commission of the offenses (*id*., §§ 1203.06, subd. (a)(1), 12022.5, subd. (a)(1)) and as to count 7 that defendant personally used a handgun in the commission of the offense (*id*., §§ 1203.06, subd. (a)(1), 12022.5, subd. (a)(1)). Defendant admitted a prior conviction for a serious or violent felony (*id*., §§ 667. subds. (a)(1), (b)-(i), 1170.12). The trial court sentenced defendant to state prison for the term prescribed by law.

We affirm the judgments of conviction. We strike defendants Arellano's and Jovel's firearm use enhancements under Penal Code section 12022.53, subdivision (b), on their burglary convictions (counts 7 and 10) and correct defendant Arellano's abstract of judgment. We remand defendant Perez's case for resentencing.

STATEMENT OF FACTS

Counts 8-10

Ramiro (Ramiro) and Angelina (Angelina) Romo lived in a house in Whittier with their three children. Ramiro had a job as a cook but also sold clothing and leather goods to supplement his income. Ramiro had met defendant Perez through Perez's brother-in-law, Angel. About March 1999, Perez and his sister went to Ramiro's house inquiring about leather goods. The sister bought some shoes.

At about 9:00 p.m. on April 7, 1999, Ramiro was home watching television while Angelina fed the children. There was a knock at the door. Ramiro answered it. Defendants Arellano and Jovel were at the door. Arellano said Angel had sent them.

Ramiro believed they were there to pay him the money Angel owed him for clothing Angel had purchased. Ramiro opened the metal security door. Jovel pointed a gun at Ramiro's stomach and told him to be quiet and not to move. Arellano and Jovel then entered the house.

Jovel told Ramiro to get his wife and children. Ramiro called Angelina, who came out of the kitchen to find Arellano pointing a gun at her. Angelina called the children. Arellano and Jovel then took the family to the master bedroom. Arellano held them at gunpoint while Jovel rummaged through the house. At one point, Jovel came back to the bedroom and brought Ramiro out. He asked Ramiro where the money was, and whether he had any drugs. Ramiro said he only had the money in his wallet, and he did not have or use drugs. He gave Jovel the money from his wallet. Jovel then took him back to the bedroom.

Jovel finally returned to the bedroom. He pointed his gun at the family and threatened to blow their brains out if they called the police. He pulled the telephones from the walls. He and Arellano left the bedroom. Ramiro waited until he thought the two men had left the house, then got up to close the front door. Jovel was still in the house. He ordered Ramiro back into the master bedroom, threatening to kill the family if they moved, looked out the window or did anything for 20 minutes. He then left. A car drove away from the house.

Ramiro and Angelina checked to see what had been taken from the house. They discovered clothing, leather goods, money and jewelry had been taken. Out of fear, they did not report the robbery until the following day.

Counts 1-7

Domingo Ekonomo (Ekonomo) owned a used car dealership, Ekonomo Car Sales, on Figueroa in Los Angeles. At about 6:30 p.m. on April 21, 1999, Ekonomo was in the office of the car dealership, talking to a friend, Jorge Jiminez (Jimenez). Defendants Arellano and Perez walked into the office. Perez asked for the key to a white Cadillac

that was on the lot. When Ekonomo turned to get the key, Perez pulled a semiautomatic handgun from his waistband. He hit Ekonomo twice in the head with it, knocking Ekonomo to the floor. Arellano ordered Jiminez to the floor. Jiminez complied. He observed a silver-gray object, which was consistent in size and shape with a gun, in Arellano's hand.

Perez began rummaging through the office, throwing things and pulling telephone cords from the wall. He demanded to know where Ekonomo kept the money. He kicked Ekonomo in the ribs. He then took "a good size wad" of money from Ekonomo's pants pocket, as well as Ekonomo's rings, chain, necklace, bracelet and watch. Arellano took money and jewelry from Jiminez. Perez and Arellano also took a briefcase, two telephones and two pull-out car stereos from the office. Before leaving, they bound Ekonomo's and Jiminez's hands behind them with duct tape and put duct tape over Ekonomo's mouth. Perez and Arellano threatened to kill Ekonomo and Jiminez if they moved. They then left the office.

Aida Secobia, who worked next door, heard the robbery in progress and telephoned 911. Los Angeles Police Officer Mario Cardona and his partner, Officer Gutierrez, responded to the call. They observed Perez and Arellano leaving the office. Perez was carrying the briefcase, telephones and car stereos. He had a gun tucked into his waistband. Arellano was holding a stainless steel revolver in his right hand.

Officer Cardona identified himself to Perez and Arellano. They both began to run, Perez dropping the telephones as he did so. They ran to a Nissan Altima, which was stopped on the street, its engine idling. Defendant Jovel was in the driver's seat. Perez attempted to throw the briefcase and car stereos into the car through an open window, but one of the stereos fell to the ground. Jovel then sped away in the Altima.

Perez and Arellano began running, throwing their guns away as they ran. They ran around a corner, where Jovel was waiting for them with the Altima. They got into the car, and Jovel again sped away. Los Angeles Police Officers Perry Griffith, Dave Armas and Dan Calderon pursued them, while a helicopter monitored their position from the air.

At one point during the pursuit, the briefcase was thrown from the Altima. The Altima stopped. All three defendants got out and began running. Eventually, they were apprehended. Perez had in his possession $1100 in bills of different denominations. Arellano had in his possession jewelry and $270. One of the stolen car stereos was recovered from the Altima. The briefcase and the two guns which had been thrown away were recovered. Ekonomo and Jiminez identified Perez and Arellano in a field showup.

Defense—Defendant Arellano

Defendant Arellano is married to Claudia; they have two young children. Arellano is a good husband and father. He had a job delivering car parts for United Axle Builders. He had never been convicted of a crime as an adult. Claudia had never seen him with a gun. As far as she knew, he did not even own a gun. She also did not know defendants Perez or Jovel. She never told a detective that Arellano used to work with Jovel.

Maria Alvarado is a good friend of Arellano. She knew him to be very religious and involved in counseling youths at his church.

Defense—Defendant Perez

Defendant Perez worked at an asbestos abatement company until he was terminated on May 7, 1999. He was a supervisor and on occasion supervised defendant Jovel. On April 21, 1999, he worked from 5:00 a.m. to 2:30 p.m.

Rebuttal

Claudia Arellano told Detective Juan Contreras that Arellano and Jovel used to work together.

CONTENTIONS

I

Defendants Arellano and Jovel contend the evidence is insufficient to sustain their convictions of assault with a semiautomatic firearm on Ekonomo (count 3) on an aiding and abetting theory.

II

Defendant Arellano also contends the findings he personally used a firearm on counts 1 through 5 and 7 must be stricken, in that they are not supported by substantial evidence.

III

Defendants Arellano and Jovel contend the firearm use enhancements under Penal Code section 12022.53, subdivision (b), on their burglary convictions (counts 7 and 10) must be stricken, in that this subdivision does not apply to burglary convictions.

IV

Defendant Perez asserts his convictions must be reversed, in that the consolidation of the cases caused gross unfairness to him, depriving him of his Fifth, Sixth and Fourteenth Amendment rights to a fair jury trial and due process of law.

V

Defendants Arellano and Jovel assert the trial court erred in refusing to provide a limiting instruction offered by the defense that would have instructed the jury to consider evidence of each crime separately.

VI

Defendants contend the trial court violated their Sixth Amendment rights to a jury trial and Fourteenth Amendment rights to due process of law by instructing the jury pursuant to CALJIC No. 17.41.1, the "anti-nullification juror snitch instruction."

VII

Defendant Perez avers that the sentence on his conviction for possession of a firearm by a felon (count 6) must be stayed pursuant to Penal Code section 654 due to the gun use enhancements imposed on the other counts.

VIII

Defendant Perez further avers that if his convictions are not reversed, his case nonetheless must be remanded for resentencing, in that the trial court, which wanted to impose a shorter sentence and mistakenly thought it was unauthorized to do so, made numerous sentencing errors.

IX

Finally, defendant Arellano contends his abstract of judgment must be corrected to reflect the proper sentence and sentencing credits.

DISCUSSION

I

Defendants Arellano and Jovel contend the evidence is insufficient to sustain their convictions of assault with a semiautomatic firearm on Ekonomo (count 3) on an aiding and abetting theory. We disagree.

When the sufficiency of the evidence is challenged, the question on appeal is whether the conviction is supported by substantial evidence, i.e., evidence from which a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt. (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.) In making this determination, we view the entire record in the light most favorable to the prosecution, presuming in support of the judgment the existence of every fact the trier reasonably could deduce from the evidence. (*People v. Rayford* (1994) 9 Cal.4th 1, 23; *People v. Ceja* (1993) 4 Cal.4th 1134, 1138-1139.)

Substantial evidence is that which is reasonable, credible and of solid value. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329.) Although all reasonable inferences must be drawn in support of the judgment, the court "may not 'go beyond inference and into the realm of speculation in order to find support for a judgment. A finding . . . which is merely the product of conjecture and surmise may not be affirmed.'" (*People v. Memro* (1985) 38 Cal.3d 658, 695.) Additionally, it is the exclusive province of the trier of fact to determine witness credibility and the truth or falsity of the facts; the court

is not free to substitute its view of the evidence for that of the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Ceja*, *supra*, 4 Cal.4th at p. 1139.)

Liability as a principal attaches to those who directly commit an offense or who aid and abet its commission. (Pen. Code, § 31; *People v. Montoya* (1994) 7 Cal.4th 1027, 1038.) The requisite intent for the imposition of liability must be formed before or during the commission of the offense. (*Id*. at p. 1039.) Acts constituting aiding and abetting must also take place before or during the commission of the offense. (*Ibid*.)

One may be held liable as an aider and abettor when, with knowledge of the perpetrator's criminal purpose, he gives the perpetrator aid or encouragement with the intent of facilitating the perpetrator's commission of the crime. (*People v. Champion* (1995) 9 Cal.4th 879, 928; *People v. Beeman* (1984) 35 Cal.3d 547, 560.) An aider and abettor is liable not only for the offense he or she aids and abets or conspires to commit, but also for any other reasonably foreseeable offense committed by the person aided and abetted. (*People v. Price* (1991) 1 Cal.4th 324, 442.) What "is required is that defendant knew or should have known that the charged crime was likely to happen in some manner as a result of the commission of the targeted crime." (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1602-1603.) Thus, an aider and abettor or coconspirator "'"is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but he is also liable for the natural and reasonable consequences of any act that he knowingly aided or encouraged [or conspired to commit]. Whether the act committed was the natural and probable consequence of the act encouraged and the extent of defendant's knowledge are questions of fact for the jury."'" (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5, quoting from *People v. Durham* (1969) 70 Cal.2d 171, 181, italics omitted.)

Defendants first argue that "there was insufficient evidence of [their] knowledge of the unlawful purpose of Perez, and insufficient evidence that [they] had the intent or purpose of committing, encouraging, or facilitating the commission of Perez's assault on Ekonomo." They further argue the assault on Ekonomo "was not a natural and probable

consequence of the intended offense of robbery. . . . Consequently, there was insufficient evidence to support [their] conviction[s] for assault with a semiautomatic firearm on an aiding and abetting theory under the 'natural and probable consequence' form of derivative liability."

The Supreme Court noted in *People v. Prettyman* (1996) 14 Cal.4th 248 that the "'natural and probable consequences' doctrine [has been applied] in situations where a defendant assisted in the commission of an armed robbery, during which a confederate assaulted or tried to kill one of the robbery victims. In those cases, courts upheld jury verdicts convicting the defendant of assault and/or attempted murder, on the ground that the jury could reasonably conclude that the crime was a natural and probable consequence of the robbery aided by the defendant. [Citations.]" (At pp. 262-263.) It is reasonably inferable that an armed confederate engaged in the commission of a robbery will use his weapon during the course of the robbery, to overcome the victim's resistance, to effect an escape, or even accidentally. (See *People v. Rogers* (1985) 172 Cal.App.3d 502, 515; *People v. Fagalilo* (1981) 123 Cal.App.3d 524, 532; *People v. George* (1968) 259 Cal.App.2d 424, 429.)

Defendants rely on *People v. Solis* (1993) 20 Cal.App.4th 264[1] for the proposition that "[a]n assault is not the reasonable and foreseeable consequence of a thwarted theft." *Solis* states that this is the case, "[f]or instance, when one urges a shoplifter to steal cigarettes for joint use, knowing the shoplifter to be a harmless drifter, there is no liability for the unexpected assault which occurs in the shop when the crime is thwarted. This is because under the circumstances known to the aider and abettor the trivially criminal conduct to be perpetrated by a known pacifist will not, under an objective standard of foreseeability, lead to serious consequences." (At p. 273.) The logic of *Solis* does not apply where one aids and abets an armed robbery. Use of the weapon carried to commit the robbery is not objectively unforeseeable.

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[1] Disapproved on another ground in *People v. Prettyman, supra,* 14 Cal.4th at p. 268, fn. 7.

In this case, an assault on Ekonomo was a natural and probable consequence of the armed robbery of Ekonomo at his car dealership. Therefore, defendants Arellano and Jovel are liable for that assault as aiders and abettors of the robbery. (*People v. Prettyman*, *supra*, 14 Cal.4th at pp. 262-263.) Substantial evidence supports their convictions on count 3. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 848-849.)

II

Defendant Arellano also contends the findings he personally used a firearm on counts 1 through 5 and 7 must be stricken, in that they are not supported by substantial evidence. Again, we disagree.

Defendant relies on the fact that Jimenez could not identify the silver-gray object in Arellano's hand as a gun, although he testified that it could have been a gun. He acknowledges, however, that as he left the building, Officer Cardona saw him holding a gun in his hand. From the foregoing, it is reasonably inferable that defendant did, in fact, have a gun in his hand during the commission of the offenses charged in counts 1 through 5 and 7.

"Use" of a firearm "requires something more than merely being armed." (*People v. Chambers* (1972) 7 Cal.3d 666, 672.) If the firearm is not fired or used to strike the victim, it must at least be displayed in some fashion accompanied by a threat of use sufficient to produce a fear of harm. (*People v. Jacobs* (1987) 193 Cal.App.3d 375, 381.) The threat need not be verbal. (See *ibid*.; *People v. Smith* (1980) 101 Cal.App.3d 964, 967.) "[W]hen a defendant deliberately shows a gun, or otherwise makes its presence known, and there is no evidence to suggest any purpose other than intimidating the victim (or others) so as to successfully complete the underlying offense, the jury is entitled to find a facilitative use . . . ." (*People v. Granado* (1996) 49 Cal.App.4th 317, 325.)

"Here there was no reasonable explanation for defendant's conduct other than a desire to facilitate the crime." (*People v. Granado*, *supra*, 49 Cal.App.4th at p. 325.) After Ekonomo turned to get the key requested by Perez, Perez pulled a semiautomatic handgun from his waistband. He hit Ekonomo twice in the head with it, knocking Ekonomo to the floor. Defendant Arellano also took out a gun. He ordered Jiminez to the floor. Jiminez complied. After taking what they wanted, Perez and Arellano left the car dealership, guns still in their hands. "The most obvious explanation, indeed the only apparent one, was a deliberate display, intended to convey menace, for the purpose of advancing the commission of the offense." (*Ibid.*) That Jiminez was not certain the object in defendant's hand was a gun does not preclude a use finding. A use finding is based upon the defendant's actions and intent, not the victim's awareness of use. (*Id*. at pp. 326-329.) Accordingly, the personal use findings on counts 1 through 5 and 7 are supported by substantial evidence. (*People v. Rayford*, *supra*, 9 Cal.4th at p. 23; *People v. Ceja*, *supra*, 4 Cal.4th at pp. 1138-1139.)

III

Defendants Arellano and Jovel contend the firearm use enhancements under Penal Code section 12022.53, subdivision (b), on their burglary convictions (counts 7 and 10) must be stricken, in that this subdivision does not apply to burglary convictions. The People acknowledge that Penal Code section 12022.53, subdivision (b), by its terms does not apply to burglary convictions. They agree that defendants' firearm use enhancements under that section on counts 7 and 10 therefore must be stricken.[2]

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[2] Defendant Arellano received firearm use enhancements under this section on both counts 7 and 10. Defendant Jovel received one on count 10 only.

IV

Defendant Perez asserts his convictions must be reversed, in that the consolidation of the cases caused gross unfairness to him, depriving him of his Fifth, Sixth and Fourteenth Amendment rights to a fair jury trial and due process of law. The assertion is without merit.

Defendant was charged in case number BA184992 with the crimes in counts 1 through 7, the Ekonomo offenses. Over his objection, this case was consolidated with case number VA054479, in which defendants Arellano and Jovel were charged with both the Ekonomo offenses and those in counts 8 through 10, the Romo offenses. Although defendant Perez initially was charged with the Romo offenses, those charges were dismissed at the preliminary hearing based on a lack of evidence.

In arguing the motion, the prosecutor stated that consolidation would be of no prejudice to defendant Perez, in that he was not charged with the Romo offenses and he would not be mentioned in the case involving those offenses. Defense counsel found it "hard to believe that the jury would make no inference that Mr. Perez was somehow not involved in the other case just because he was not mentioned specifically." The trial court concluded the cases properly could be consolidated. There would be no substantial prejudice to defendant Perez by joinder of the cases. In any event, the jury would be instructed throughout the trial that it was to consider each count separately.

Defendant does not claim that the trial court abused its discretion in ordering consolidation of the two cases. He claims that "the prosecutor completely reneged on his promise to omit any reference to [defendant] in the much more prejudicial residential robberies charges." In addition, "the trial court reneged on its promise to instruct the jury throughout trial to consider each count separately." It rejected his proffered instruction that the jury was "not to use one incident as proof of the commission of the other." Therefore, he was prejudiced by the consolidation of the cases, deprived of his rights to a fair trial and due process of law.

As defendant points out, evidence was elicited tying him to the Romo offenses. In addition to evidence of his contact with Ramiro Romo just a month before the offenses occurred, there was evidence that a third person may have been involved in the offenses. Ramiro testified that when defendants Arellano and Jovel first took him and his family into the bedroom, one of them "came close to the window and made some signals." About 25 minutes later, he again went to the window and moved his hand.

Additionally, Ramiro testified that he identified defendant Perez in a photographic lineup on May 12, 1999. Detective Davey Chapman testified that Ramiro "identified Mr. Perez as the individual he knew who he suspected as being the driver or the person outside of the residence." He testified also that Angelina Romo identified Perez as "who she suspected as being the driver."

During argument, the prosecutor repeatedly tied defendant to both sets of offenses. He argued that the Romos and Ekonomo and Jiminez had "a common bond of terror [that] is a trio of individuals that have been sitting here peaceably the last week before you, Ismael Perez, Javier Arellano, and Rene Jovel. [¶] These individuals, in two separate reigns of terror, under very similar circumstances, robbed these individuals, burglarized their businesses and their homes, imprisoned them falsely by violence and essentially terrorized and traumatized them for years to come. And it is those three faces that will be etched and burned in the memories of people like Angelina Romo for the rest of her life."

The prosecutor talked about the interconnection of the two sets of offenses and the three defendants. He suggested that when defendants Arellano and Jovel left the Romo residence and the Romos heard a "car engine going away," "[w]e can surmise, it's Mr. Perez. [¶] Why? Because Mr. Perez had a connection to that house, and Mr. Perez changed roles the second time around and ended up being one of the gunmen while his buddy, Mr. Jovel, shows other duty and that is to be the getaway car driver. Think about it, what are the coincidences."

In closing argument, the prosecutor addressed defendant's argument "that somehow it was unfair to bring up the Perez connection with respect to the first robbery of the Romo's [*sic*]. [Counsel] said why did Mr. Perez get connected into that because he happened to know someone who knew the Romo's [*sic*] and had actually been over at the Romo's house once before, since he wasn't actually charged with the robbery in that case." The prosecutor stated: "We're charging two signature crimes where each of these defendants has left their M.O., their signature, their pattern, and their scheme. And it would obviously be very important for you to know that if he had done this once before, he was more likely to have done it again. A leopard hardly ever changes its spots."

Defendant points to nothing in the record to show that he objected to any of the evidence or argument which he now claims deprived him of a fair trial. Additionally, he points to nothing in the record to show that he renewed his motion for severance on the ground of prejudice arising from the consolidation.

The record shows that following argument, during jury instructions, defendants requested an instruction reading: "Evidence has been presented on two separate incidents, evidence that was admitted. One incident should not be used by you, the jury, to infer guilt on the other. Each incident needs to be considered by you separately." The prosecutor opposed such an instruction, claiming that at the time the motion for consolidation was filed, the issue of cross-admissibility of evidence was addressed. He argued that the defense did not previously request an instruction on limited admissibility or bring up the issue, even though it was clear he was linking the two incidents together in terms of perpetrators and modus operandi. Further, evidence of one incident was relevant to prove participation in the other under Evidence Code section 1101, subdivision (b).

The trial court questioned the prosecutor: "I got the impression that on the Romo case, the last three counts, that in the People's case in chief, they did not mention Mr. Perez." The prosecutor responded that he had agreed not to during the consolidation motion. Further, he had no "objection to having a limiting instruction to the jury

indicating that Mr. Perez has not been charged in the crime with the Romo's [*sic*] and that whatever inference may arise as to his connection to the Romo's [*sic*] is not relevant to his guilt in the second crime. [¶] I have no problem with that. That's been stipulated to, the reason it was brought in is because Mr. Spiga[, counsel for defendant Jovel], in his opening statement, opened the door and then we approach and then it became fair game for everybody." Defendant Perez's participation in the Romo offenses was "to some degree relevant" to prove "Mr. Jovel's guilt [as to the Ekonomo offenses] because he is sitting outside in the car when Mr. Perez and Mr. Arellano, his other confederates, are inside."

The trial court stated that it had no problem with instructing the jury that defendant Perez was not charged in connection with the Romo offenses. It added, "Of course, the court is going to reject the proffered instructions in the middle of instructions." It then instructed the jury: "All right, this is an oral instruction to the jury. Mr. Perez is not charged in the incident of April 7th. That's the last three counts, 8, 9, and 10. And even though the instructions may mix it, it's a separate case."

The People claim that defendant waived his contention by failing to renew his severance motion once mention was made of defendant in connection with the Romo offenses. In *People v. Ervin* (2000) 22 Cal.4th 48, the Supreme Court stated that once a severance motion has been denied, "[i]f further developments occur during trial that a defendant believes justify severance, he must renew his motion to sever." (At p. 68.) Failure to do so precludes raising the point on appeal. (*Ibid*.)

Defendant points out that the Supreme Court in *Ervin* added to the foregoing: "Nonetheless, we have also stated that a reviewing court may reverse a conviction when, because of consolidation, '"gross unfairness"' has deprived the defendant of a fair trial." (*People v. Ervin*, *supra*, 22 Cal.4th at p. 69.) Thus, if defendant can demonstrate gross unfairness depriving him of a fair trial, he is entitled to reversal, notwithstanding that he failed to renew his severance motion. (*Ibid*.)

The record shows that defendant allowed evidence to be admitted linking him to the Romo offenses. He allowed the prosecutor to argue the similarities between the Romo and Ekonomo offenses, showing a common plan or scheme. He did not object or renew his motion for severance. Even now, he does not argue that the evidence was not cross-admissible to show a common plan or scheme pursuant to Evidence Code section 1101, subdivision (b).[3] Under these circumstances, there was no gross unfairness in allowing the consolidated trial to proceed. Defendant was not deprived of a fair trial. Hence, he waived his challenge to consolidation of the cases. (*People v. Ervin*, *supra*, 22 Cal.4th at p. 68.)

V

Defendants Arellano and Jovel assert the trial court erred in refusing to provide a limiting instruction offered by the defense that would have instructed the jury to consider evidence of each crime separately. We cannot agree.

As discussed in part IV, *ante*, during the trial court's instruction of the jury, defendants requested an instruction reading: "Evidence has been presented on two separate incidents, evidence that was admitted. One incident should not be used by you, the jury, to infer guilt on the other. Each incident needs to be considered by you separately." The trial court refused to give the requested instruction.

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[3] Evidence Code section 1101, subdivision (a), prohibits, with specified exceptions, admission of "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) . . . when offered to prove his or her conduct on a specified occasion." Subdivision (b) of section 1101 provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act."

Where appropriate, a defendant may be entitled to a limiting instruction regarding the use of other crimes evidence. (*People v. Falsetta* (1999) 21 Cal.4th 903, 923-924.) Here, however, defendants never objected under Evidence Code section 1101, subdivision (a), to the use of evidence of one set of offenses to prove participation in the other. They never objected to the prosecutor's argument tying the two sets of offenses together with a common plan or scheme.

Evidence Code section 355 provides: "When evidence is admissible as to one party or for one purpose and is inadmissible as to another party or for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly." Since defendants never requested that the trial court restrict the evidence to its proper scope, the trial court did not err in refusing to instruct the jury as to such restriction. (See *People v. Miranda* (1987) 44 Cal.3d 57, 83 [error in failing to give limiting instruction where evidence was admitted for a limited purpose].)

VI

Defendants contend the trial court violated their Sixth Amendment rights to a jury trial and Fourteenth Amendment rights to due process of law by instructing the jury pursuant to CALJIC No. 17.41.1, the "anti-nullification juror snitch instruction." We reject this contention.

The trial court instructed the jury pursuant to CALJIC No. 17.41.1 that "[t]he integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the

other jurors to immediately advise the Court of the situation."[4] Defendants argue that this instruction infringed upon the jury's right to privacy and secrecy and its power of jury nullification.

Defendants raised no objection in the trial court to the jury's instruction with CALJIC No. 17.41.1. Their failure to do so waives any claim of error, in that CALJIC No. 17.41.1 does not affect any fundamental rights. (*People v. Guiuan* (1998) 18 Cal.4th 558, 570; *People v. Elam* (2001) 91 Cal.App.4th 298, 310-313.)

As the Supreme Court recently has reiterated, while "a jury has the ability to disregard, or nullify, the law" (*People v. Williams* (2001) 25 Cal.4th 441, 449), "it is still the right of the court to instruct the jury on the law, and the duty of the jury to obey the instructions" (*id*. at p. 451, internal quotation marks omitted). The trial court is not required to instruct the jury on its power of nullification or permit the jury to disregard the law. (*Id*. at p. 455.) Rather, it is proper for the trial court to instruct the jury on its obligation to follow the instructions given to it and to discharge a juror who refuses to do so. (*Id*. at p. 451.)

The directive set forth in CALJIC No. 17.41.1 to notify the court if a juror refuses to deliberate, expresses an intent to disregard the law, or to use any improper basis, such as punishment, in reaching a verdict is a vehicle for ensuring that jurors comply with their duties. CALJIC No. 17.41.1 does nothing more than remind jurors of their obligation to follow the instructions given to them, which is absolutely proper. (*People v. Williams*, *supra*, 25 Cal.4th at p. 452.)

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[4] The propriety of CALJIC No. 17.41.1 currently is pending before the California Supreme Court (*People v. Engelman*, review granted Apr. 26, 2000, S086462; *People v. Taylor*, review granted Aug. 23, 2000, S088909).

VII

Defendant Perez avers that the sentence on his conviction for possession of a firearm by a felon (count 6) must be stayed pursuant to Penal Code section 654 due to the gun use enhancements imposed on the other counts. We agree.

Penal Code section 654 provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ." (Subd. (a).) The section protects against multiple punishment for "multiple statutory violations produced by the 'same act or omission.'" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.)

Possession and use of a firearm are not the same; imposition of an enhancement for firearm use requires more than mere possession of the weapon. (*People v. Funtanilla* (1991) 1 Cal.App.4th 326, 330-331, disapproved on another ground in *People v. Masbruch* (1996) 13 Cal.4th 1001, 1013-1014, fn. 7.) It thus has been held that Penal Code section 654 does not bar separate punishment for both possession of the firearm by a felon and its use in the commission of a crime. (*People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1410-1414.)

Defendant relies on *People v. Mustafaa* (1994) 22 Cal.App.4th 1305 for his contention. In *Mustafaa*, the court "observe[d] that the consecutive . . . term imposed for Mustafaa's being a convicted violent ex-felon in possession of a firearm ([Pen. Code,] § 12021.1, subd. (a)) appears to be based on the same conduct as that on which the term for the personal gun-use enhancement . . . was based." (*Id*. at p. 1312.) It therefore held imposition of the term "violate[d] section 654's proscription against multiple punishments for the same act or omission." (*Ibid*., fn. omitted.)

People v. Bradford (1976) 17 Cal.3d 8 holds that "'where the evidence shows a possession distinctly antecedent and separate from the primary offense, punishment on both crimes has been approved. On the other hand, where the evidence shows a

possession only in conjunction with the primary offense, then punishment for the illegal possession of the firearm has been held to be improper where it is the lesser offense.'" (At p. 22.) In applying this rule to the facts of *Bradford* — the defendant disarmed an officer and fired at the officer and a bystander — the court stated: "Defendant's possession of Officer Patrick's revolver was not 'antecedent and separate' from his use of the revolver in assaulting the officer. The punishment provided for violation of [Penal Code] section 12021 is the lesser punishment for the two crimes. . . . Therefore, its execution must be stayed. [Citations.]" (*Id.* at pp. 22-23.)

People v. Ratcliff, supra, 223 Cal.App.3d 1401 distinguishes *Bradford* on very different facts. *Ratcliff* states: "In the instant case, the evidence showed that defendant used a handgun to perpetrate two robberies separated in time by about an hour and a half. He still had the gun in his possession when he was arrested half an hour later. Unlike in *Bradford* . . . , the defendant already had the handgun in his possession when he arrived at the scene of the first robbery. A justifiable inference from this evidence is that defendant's possession of the weapon was not merely simultaneous with the robberies, but continued before, during and after those crimes." (At p. 1413.)

The instant case cannot be meaningfully distinguished from the rule stated in *Bradford*, in that "the evidence shows a possession only in conjunction with the primary offense" of robbery. (*People v. Bradford*, *supra*, 17 Cal.3d at p. 22.) Defendant was in possession of a firearm during the commission of the crimes for which the personal gun-use enhancements were imposed. He discarded the gun after the commission of the crimes. Accordingly, his sentence for possession of a firearm by a felon must be stayed under Penal Code section 654. (*Bradford*, *supra*, at pp. 22-23; *People v. Mustafaa*, *supra*, 22 Cal.App.4th at p. 1312.)

VIII

Defendant Perez further avers that if his convictions are not reversed, his case nonetheless must be remanded for resentencing, in that the trial court, which wanted to impose a shorter sentence and mistakenly thought it was unauthorized to do so, made numerous sentencing errors. The People agree that the averment has merit.

The trial court was unaware that it had the discretion to impose concurrent sentences for the Ekonomo and Jiminez robberies under the Three Strikes Law. (*People v. Deloza* (1998) 18 Cal.4th 585, 596; *People v. Hendrix* (1997) 16 Cal.4th 508, 514.) Given the opportunity to do so, it might have exercised its discretion to impose concurrent sentences. Additionally, while it imposed a consecutive sentence on count 2, the Jiminez robbery, it imposed a concurrent enhancement on that count. The People agree the sentence on a single count cannot be split in this manner. Both sentence and enhancement must run consecutively or they must run concurrently. (See *People v. Mustafaa*, *supra*, 22 Cal.App.4th at pp. 1310-1311.)

The trial court also imposed a 10-year enhancement under Penal Code section 12022.53, subdivision (b), on count 3, assault with a firearm. The jury made no finding under section 12022.53 on count 3. Thus, the enhancement was unauthorized.

Due to sentencing errors, defendant Perez's case must be remanded for resentencing.

IX

Finally, defendant Arellano contends his abstract of judgment must be corrected to reflect the proper sentence and sentencing credits. Again, the People agree.

When pronouncing judgment, the trial court imposed a 10-year enhancement on count 3 pursuant to Penal Code section 12022.5, subdivision (a). The abstract of judgment, however, indicates that the enhancement was imposed pursuant to Penal Code

section 12022.53. It must be corrected to reflect accurately the judgment pronounced by the trial court. (*People v. Olmstead* (2000) 84 Cal.App.4th 270, 278; accord, *In re Candelario* (1970) 3 Cal.3d 702, 705.)

The People also concede defendant is entitled to 330 actual days of presentence custody credit rather than the 329 reflected in the abstract of judgment. They do not concede, however, that defendant is entitled to the 50 days of good time/work time credit given him by the trial court. Under Penal Code section 2933, subdivision (c), defendant was entitled to no more than 15 percent presentence conduct credits. That 15 percent is "calculated to the greatest whole number, (without exceeding 15 percent)." (*People v. Duran* (1998) 67 Cal.App.4th 267, 270.) Fifteen percent of 330 is 49.5. Calculated to the greatest whole number not exceeding 15 percent, defendant is entitled to only 49 days of presentence conduct credits. Thus, defendant's presentence custody credits will remain at 379 days, but the abstract of judgment must be corrected to show that figure is comprised of 330 days of actual local time and 49 days of local conduct credits.

The judgments as to defendants Arellano and Jovel are modified by striking the firearm use enhancements under Penal Code section 12022.53, subdivision (b), on their burglary convictions (counts 7 and 10 for defendant Arellano, count 10 for defendant Jovel). As so modified, the judgments are affirmed. Defendant Arellano's abstract of judgment is corrected to provide 330 days of actual local time and 49 days of local conduct credits. The clerk of the court is directed to prepare corrected abstracts of judgment for defendants Arellano and Jovel and to forward them to the Department of Corrections.

Defendant Perez's judgment of conviction is affirmed. His case is remanded for resentencing.

NOT TO BE PUBLISHED

SPENCER, P.J.

I concur:

MALLANO, J.

I concur in the judgment only:

VOGEL (MIRIAM A.), J.